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No. 84-1617

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
AND GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF GREYHOUND LINES, INC., RESPONDENT

Lat J. Celmins
1742 Greyhound Tower
Phoenix, Arizona 85077
(602) 248-2942

Attorney for
GREYHOUND LINES, INC.

June 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's decision, affirmed by the Court of Appeals, authorizing an increase in intrastate Alabama bus rates is arbitrary or capricious where that Federal agency, acting pursuant to the provisions of the Bus Regulatory Reform Act of 1982, has found that Petitioner failed to rebut a statutory presumption that intrastate bus rates lower than interstate rates unreasonably burden interstate commerce.

2. Whether 49 U.S.C. §11501(e)(5) which preempts all state laws, rules, regulations, standards, or other provisions regarding implementation of bus rate reductions preempts state tariff filing requirements for such rate reductions.

STATEMENT REQUIRED BY RULE 28.1

Respondent, Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc. appears in Appendix A.

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Senate Comm. on Commerce, Science and Transportation, Bus Regulatory Reform, S. Rep. No. 97-411, 97th Cong., 2d Sess. (May 20, 1982). Reprinted in 1982 *U.S. Code Cong. & Ad. News* 2308 ("*Senate Report*") 4

Joint Explanatory Statement of the Committee of Conference, Bus Regulatory Reform Act of 1982, H.R. Conf. Rep. No. 97-780, 97th Cong., 2d Sess. (August 19, 1982). Reprinted in 1982 *U.S. Code Cong. & Ad. News* 2342 ("*Conference Report*") 4,5

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OPINIONS BELOW

The judgment of the Eleventh Circuit Court of Appeals affirmed without written opinion a decision of the Interstate Commerce Commission ("ICC"). (Pet. App. 1a). The ICC's decision is unreported. (Pet. App. 2a-14a).

JURISDICTION

The Circuit Court's judgment was entered on February 22, 1985. Petitioner timely filed its Petition For Writ of Certiorari with this Court on April 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF CASE

On October 14, 1983, Respondent, Greyhound Lines, Inc. ("Greyhound"), pursuant to the provisions of the Bus Regulatory Reform Act of 1982 ("Bus Act"), Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. §11501(e)(2)(A)(i)), requested a passenger fare increase from the Alabama Public Service Commission ("APSC" or "Petitioner") in Greyhound's low Alabama intrastate fares. APSC conducted an oral hearing on December 14, 1984. At the State hearing, Greyhound produced conclusive evidence that its intrastate fares in Alabama were less than its interstate fares for comparable transportation. (Pet. 7, 8).

Despite lower Alabama intrastate fares, APSC denied Greyhound's proposed increase, principally, for the stated reason that the lower intrastate fares result in an Alabama intrastate operating ratio which is lower than the interstate ratio. [1] Stated in another way, APSC concluded that the lower fares produced more profitable operations. APSC, therefore, denied the requested fare increase. (Pet. 7). Thereafter, on March 20, 1984, Greyhound, pursuant to the preemption provisions of Section 17 of the Bus Act (49 U.S.C. §11501(e)), requested the ICC to prescribe Alabama intrastate rates.

The ICC, after considering all the arguments and evidence of the parties, rejected APSC's arguments and approved Greyhound's requested increase in Alabama intrastate rates.

Before the ICC, Greyhound invoked one of the presumptions of the Bus Act (49 U.S.C. §11501(e)(2)(A)(i)). This provision presumes a burden on interstate commerce

[1] An "operating ratio" indicates the relationship in percent of operating expenses to revenues. *Central Territory General Increases*, 49 M.C.C. 4, 10 n. 6 (1948). Accordingly, if the carrier is operating at a loss, expenses exceed revenues and the operating ratio is in excess of 100 percent. Conversely, if the carrier's operations are profitable, expenses are less than revenues and the operating ratio is less than 100 percent. In short, under this definition, the lower the operating ratio, the more profitable the carrier; and the higher the operating ratio, the more unprofitable the carrier.

when intrastate rates are lower than interstate rates for comparable transportation. Once a bus company establishes that its intrastate rates are lower than its interstate rates (as Greyhound did in this case) this presumption shifts the burden of proof to APSC, as an objector, to demonstrate that the intrastate-interstate rate disparity does not burden interstate commerce. Before the ICC, Petitioner conceded that intrastate rates, even after the proposed increase, would be lower than interstate rates (Pet. App. 9a, 11a and 12a) but argued that it had rebutted the statutory presumption because: (1) Greyhound's Alabama intrastate operating ratio, determined under Alabama's pre-Bus Act procedures, indicated that Greyhound was purportedly profitable; and (2) Greyhound's rate increase was not needed because Greyhound, for competitive reasons, had implemented certain short-term rate reductions.

After full consideration of the record, pleadings, and evidence of the parties, the ICC rejected each of Petitioner's agruments. The ICC found that the "record clearly establishes that Greyhound's intrastate passenger fares, even at the proposed level, are significantly lower than comparable interstate fares." (Pet. App. 11a). Indeed, the ICC found that the disparity between intrastate and interstate rates was unrebutted and that this disparity imposed unreasonable burdens on interstate commerce. (Pet. App. 12a). The ICC also found that Petitioner had not shown any differences in operating conditions, services, or costs between intrastate and interstate operations to justify the disparity in applicable rates which could rebut the statutory presumption. (*Id.* 11a) Finally, the ICC found that reliance on intrastate versus interstate operating ratios on mixed operations involved arbitrary accounting assumptions and that these operating ratio calculations are not sufficiently reliable to rebut the statutory presumption raised by the rate disparity. (*Id.*). Accordingly, the ICC prescribed the requested rate increase. (*Id.* 13a).

APSC appealed the ICC's decision to the Eleventh Circuit Court of Appeals, and the Eleventh Circuit unanimously affirmed the decision of the Federal agency without written opinion. APSC now petitions this Court for a Writ of Certiorari.

BACKGROUND

The Bus Act created a new and comprehensive Federal/State scheme to regulate bus companies in order to "eliminate outdated and cumbersome regulation, thereby allowing greater flexibility of service and increased competition." S. Rep. No. 97-411, 97th Cong., 2d Sess. 1 (1982). Congress emphasized that the pre-Bus Act Federal/State structure had tended to impair bus service and diminish price and service competition. H.R. Conf. Rep. No. 97-780, 97th Cong., 2d Sess. 32 (1982) ("Conference Report"). Congress expressed particular concern that State regulation of bus companies in and of itself is "one of several significant factors contributing to this [the bus industry's] inadequate performance." State actions in the areas of entry, exit, service frequency and rates "often have significant adverse impacts on intercity bus operations" and *"impose an unreasonable burden on interstate commerce and must be preempted."* (S. Rep. No. 97-411, *supra*, at 7, 8.).

Under the Bus Act's new regulatory scheme, the respective roles of Federal and State governments have been fundamentally altered and State regulation has been

preempted in virtually every area of a bus company's service. [2]

To remedy precisely the type of inequitable and discriminatory rate disparity presented in this case, Congress through Section 17 of the Bus Act (49 U.S.C. §11501(e)) created "a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate commerce." Conference Report, *supra, at* 51. That section details the procedures for preempting State rates, rules, and practices.

The ICC is vested with jurisdiction if the State has denied or delayed for more than 120 days the carrier's request for a change of rates, rules, or practices. Thereupon, the ICC is empowered to prescribe the rate, rule, or practice and to preempt the State action if the ICC "finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." (49 U.S.C. §11501(e)(1)(B)). By its very terms, this section establishes the conditions under which discriminations against and burdens on interstate commerce arise. Subsection (2)(A) sets forth three separate, independent conditions which establish a statutory presumption that a State's rate, rule, or practice unreasonably burdens interstate commerce. Subsection (2)(B) establishes a fourth and separate condition relating solely to intrastate rates and when

[2] In the area of entry, the Bus Act authorizes the ICC to issue intrastate regular-route certificates under the Bus Act's liberalized entry standards (49 U.S.C. §10922(c)(2)(A) and (B)) to completely bypass the States' operating rights certification process. So too, States are totally preempted from regulating intrastate service reductions, schedule changes and discontinuance of service for §10922(c)(4) operating rights (49 U.S.C. §11501(e)(5) and 49 U.S.C. §10935(h)). In the important area of small package property services, all State laws and regulations relating to pick-up and delivery of package express are totally preempted (49 U.S.C. §10922(c)(2)(C)). Bus companies can exit intrastate service, and the ICC preempts State actions under a mechanism which parallels the Section 17 rate preemption provisions (49 U.S.C. §10935).

such rates are presumed to be a burden on interstate commerce. *Commissioner of Transportation of N.Y. v. U.S.*, 750 F.2d 163, 169 (2d Cir. 1984), cert. denied, 105 S.Ct. 2019 (April 15, 1985).

At issue in this proceeding is the presumption under 49 U.S.C. §11501(e)(2)(A)(i) that Alabama's rates, rules, or practices unreasonably burden interstate commerce because they result in Greyhound charging a lower rate for intrastate transportation than for comparable interstate transportation. [3]

Upon Greyhound's invocation of this presumption, there is a Congressionally presumed burden on interstate commerce, and it is incumbent upon Petitioner, as the objecting party, to show that the rate disparity is justified and does not discriminate against and burden interstate commerce. An objector can meet its burden of proof and rebut the statutory presumption by demonstrating differences in operating conditions, services, or costs between the intrastate and interstate operations sufficient to justify the rate disparity. *In re Petition of Greyhound Lines, Inc., For Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. §11501* (decided April 13, 1984) (not printed). (Pet. App. 22a, 23a). *Aff'd sub nom. Public Service Commission of West Virginia v. ICC,*

[3] The two other subsection (2)(A) conditions which give rise to the presumptions are: (i) "that as a result of such rate, rule, or practice, such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation;" or (ii) the appropriate State authority has "failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request."
Under the fourth separate condition of subsection (2)(B) the presumptions arise if the ICC "finds that the most recent general rate increase applicable to the transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation . . ."

749 F.2d 32 (4th Cir. 1984). (Decision without published opinion).

REASONS FOR DENYING THE WRIT

This case presents narrow issues reasonably decided by the ICC and the Court of Appeals without dissent and without conflicting opinion from any other Circuit. There are no special or important reasons for granting the Petition for Writ of Certiorari.

To date, three other Circuits have rendered opinions in Section 17 cases. All three Circuit Courts have affirmed the ICC's interpretation of that section. *West Virginia v. ICC, supra; Commissioner of Transp. of N.Y. v. U.S., supra; State of Texas v. United States,* _____ F.2d _____ (5th Cir. May 28, 1985).[4] The complete consistency of interpretation among the Circuits, without conflict or dissent, further confirms that this case presents no issue deserving of review by this Court.

Denial of the Petition for Writ of Certiorari is made easy when Petitioner's arguments are put in focus. In the Court of Appeals below and in its Petition, APSC concedes that Congress through the specific provisions of the Bus Act expressly intended to, and did, selectively preempt areas of State regulation. Petitioner further concedes that Congress authorized the ICC to prescribe intrastate bus rates. (Pet. 10-12). Denial of APSC's Petition is also made easy when consideration is given to the issues which Petitioner does not contest or has abandoned.

Petitioner alludes to, but does not contest, the power of Congress to authorize the ICC to preempt intrastate bus rates. Petitioner does not contest the validity of the Bus Act nor the rate preemption provisions of Section 17. Petitioner does not contest the validity of the statutory presumptions under which intrastate rates, rules, and practices are deemed

[4] Remanded to the ICC on other grounds in order for the ICC to consider excursion fares offered by the carriers under the facts of that case.

to burden interstate commerce. Finally, Petitioner does not contest that once lower intrastate bus rates are established, the burden of proof shifts to the objector to rebut the presumption that such rates burden interstate commerce.

While conceding that the Bus Act explicitly preempts State rates, rules, and practices, Petitioner inexplicably raises an undeveloped argument regarding concepts of Federalism. Significantly, Petitioner agrees that where, as here, Congress has clearly articulated the justification for the exercise of Federal power (preemption provisions of Section 17) and such exercise is made "definitely and clearly apparent," the principles of Federalism are satisfied. (Pet. 13, 14). That Congress has such power is beyond serious argument. *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264, 277 (1981).

The decisions cited by Petitioner construe materially different statutory schemes than that now presented to this Court. Petitioner's decisions relate primarily to railroad rates and, consequently, are totally inapplicable here. These decisions relate to an earlier Section 13(4) (formerly 49 U.S.C. §13(4) concerning railroad rates). Under that statutory scheme then applicable to railroads, the burden of proof rested with the rail carrier to show the burdening of interstate commerce. Under the Bus Act, the opposite is true. Once the ICC asserts jurisdiction, the burden of proof is on the objector. Where the carrier, as here, has established that its intrastate rates are lower than interstate rates for comparable transportation, Petitioner has the burden to rebut that presumption with substantial evidence. This APSC failed to do.

Petitioner raises general notions of Federalism relying principally on *North Carolina v. U.S.* 325 U.S. 507 (1945), and argues that there must be "a high standard" and "clear justification" for exercise of Federal power. (Pet. 15). The question in *North Carolina* was whether the ICC had made the necessary findings, with sufficient clarity under the former Section 13(4), in order for it to preempt State authority

over intrastate rail rates. Under the Bus Act, however, Congress itself preempted State authority over intrastate rates and entrusted the ICC with the power to prescribe intrastate rates within the established substantive legal criteria. Congress itself identified conditions where burdening of interstate commerce is presumed. The Second Circuit Court faced with arguments identical to those presented here passed on this precise question and concluded that under the Bus Act "Congress made a decision to allow substantial preemption of state regulatory authority" and, therefore, the "rigid requirements of *North Carolina v. U.S.* do not apply to the Commission's decisions made pursuant to the Bus Act." *Commissioner of Transp. of N.Y. v. U.S., supra,* at 169. The Second Circuit case was also subject to a Petition for Writ of Certiorari which this Court denied. Moreover, statutory enactments amending Section 13(4) subsequent to the cases relied upon by Petitioner raise serious questions whether *North Carolina* and its progeny are even applicable to rail rates. See The Staggers Rail Act of 1980, 49 U.S.C. §11501(b)-(d). Taken collectively, the fundamental principles of Federalism which Petitioner raises are fully satisfied by the Bus Act's statutory scheme and the determinations below.

Petitioner relies on an operating ratio analysis which compares intrastate and interstate operations in a combined service, and argues that it thereby meets its burden of proof under 49 U.S.C. §11501(e)(2)(A)(i). Petitioner's operating ratio arguments for combined intrastate-interstate service have been repeatedly rejected by the ICC in numerous consistent decisions because they involve "highly arbitrary accounting assumptions", "lead to absurd and unreasonable result(s)" and are unreliable. *In re West Virginia, supra,* (Pet. App. 23a-25a). The Eleventh Circuit in this case and two other Circuit Courts have likewise rejected operating ratio arguments and operating ratios themselves as lacking sufficient reliability to constitute probative evidence sufficient to rebut the Bus Act's statutory presumptions.

West Virginia v I[illegible], supra; and *Commissioner of Transp. N.Y. v. U.S., supra, at 170.*

These Circuit Court decisions confirm the unreliability of intrastate-interstate operating ratio comparisons for combined intrastate and interstate service and the lack of probative value of such evidence.

Petitioner further raises an issue regarding the preemptive scope of 49 U.S.C. §11501(e)(5). That subsection is as broad as any Federal statutory preemption provision:

> "No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law ... relating to the implementation of any reduction in the rates for such [interstate or intrastate] transportation ..."

That provision is clear on its face and explicitly preempts State actions relating to rate reductions by bus companies. In view of the express and plain meaning of this provision, no interpretative review by this Court is warranted.

CONCLUSION

Petitioner's arguments present narrow issues which do not merit the attention of this Court. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,
ORIGINAL SIGNED BY
L. J. CELMINS

Lat J. Celmins
1742 - Greyhound Tower
Phoenix, Arizona 85077
(602) 248-2942
Attorney for
GREYHOUND LINES, INC.

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CERTIFICATE OF SERVICE BY MAIL

Lat J. Celmins, being a member of the bar of this Court, hereby certifies that:

1. He is counsel of record for Greyhound Lines, Inc., one of the Respondents herein.

2. Three copies of the attached Brief in Opposition of Greyhound Lines, Inc., Respondent, have been served upon each counsel for the parties, in accordance with the provisions of Rule 28 of this Court, by placing the same in the United States Express Mail, postage prepaid, properly addressed to:

Stanley W. Foy, Esq.
Alabama Public Service Commission
Room 783
State Office Building
501 Dexter
Montgomery, Alabama 36104

Solicitor General
Department of Justice
Constitution Ave. between
9th and 10th Streets, N.W.
Washington, D.C. 20530

John P. Fonte, Esq.
Appellate Section
Antitrust Division — Room 3313
10th & Pennsylvania Ave.
U.S. Department of Justice
Washington, D.C. 20530

Timm L. Abendroth, Esq.
Office of the General Counsel
Interstate Commerce Commission — Room 5220
12th St. & Constitution Ave., N.W.
Washington, D.C. 20423

3. All parties required to be served have been served.

DATED: June 5, 1985

ORIGINAL SIGNED BY
L. J. CELMINS

Lat J. Celmins
1742 — Greyhound Tower
Phoenix, Arizona 85077
(602) 248-2942

APPENDIX A

APPENDIX A

LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province, or country of incorporation and ownership percentage are shown in parentheses following each name. Where no ownership percentage appears, the ownership interest is 100 per cent. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

THE GREYHOUND CORPORATION (ARIZONA) (PARENT)

TRANSPORTATION GROUP:

GREYHOUND LINES, INC. (California)
- Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
- Greyhound Lines of Canada Ltd. (Canada) (68%)
- Motor Coach Industries Limited (Manitoba) (68%)
- Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
- Jefferson Lines Holding Company (Minnesota) (40%)
- Kerrville Bus Company, Inc. (Texas) (40%)
- Southeastern Stages, Inc. (Georgia) (40%)
- Springfield Bus Terminal Corporation (Massachusetts) (32%)
- Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
- Wilmington Union Bus Station Corporation (North Carolina) (25%)

Texas, New Mexico & Oklahoma Coaches, Inc. (Texas) (98%)

Motor Coach Industries is a part of the Transportation Manufacturing Group but is a subsidiary of Greyhound Lines, Inc.

AFFILIATES

TRANSPORTATION MANUFACTURING GROUP:

Motor Coach Industries, Inc. (Delaware)
Transportation Manufacturing Corporation (Delaware)
Universal Coach Parts, Inc. (Delaware)

CONSUMER PRODUCTS GROUP:

Armour-Dial, Inc. (Delaware)
  Armour Handcrafts, Inc. (Arizona)
  Armour International Company (Arizona)
Purex Corporation (Delaware)

FINANCIAL GROUP:

Greyhound Capital Corporation (New York)
Greyhound Financial & Leasing Corporation AG
  (Switzerland)
Greyhound Leasing & Financial Corporation (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Verex Corporation (Arizona)

SERVICES AND FOOD SERVICE GROUP:

Aircraft Service International, Inc. (Delaware)
Consultants & Designers Inc. (Delaware)
Dispatch Services, Inc. (Florida)
Faber Enterprises, Inc. (Delaware)
Florida Export Tobacco Co. Inc. (Florida)
Greyhound Exhibitgroup Inc. (Delaware)
Greyhound Exposition Services, Inc. (Nevada)
Greyhound Food Management, Inc. (Michigan)
  Glacier Park, Inc. (Arizona) (80%)
  Restaura, S.A. (Belgium)
Greyhound Support Services, Inc. (Delaware)
Post Houses, Inc. (Delaware)
Premier Cruise Lines, Ltd. (Cayman Islands)
Travelers Express Company, Inc. (Minnesota)